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NO. 91-391

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ANDREW E. KARIM,

Petitioner,

v.

NANCY ELLAN BOYER,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

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BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

Andrew E. Karim filed a Chapter 7 Bankruptcy Petition on August 11, 1987, for David Lee Wear. Wear's former wife, now creditor, Nancy Ellan Boyer brought an adversary proceeding seeking to except her property division alimony debt from Wear's bankruptcy pursuant to 11 U.S.C. §727. The bankruptcy court excepted the Boyer property division alimony judgment from discharge on August 17, 1988.

On September 20, 1988, the bankruptcy trial judge announced that he was dismissing the debtor's bankruptcy petition pursuant to 11 U.S.C. §§707(b) and 305(a), ruling that the debtor was improperly using the bankruptcy system to re-litigate an acrimonious state divorce case. At that same hearing, the trial judge announced his intention to impose sanctions against the debtor and his counsel, Andrew E. Karim, for the misuse and abuse of the bankruptcy system.

The dismissal of the bankruptcy petition was appealed to the District Court and then to the Tenth Circuit Court of Appeals, where it was sustained. During the interim, an order was entered by the clerk of the bankruptcy court inadvertently discharging Wear's indebtednesses. On suggestion of the trial court, Boyer filed a motion seeking the revocation of debtor's discharge as having been improperly entered, pursuant to 11 U.S.C. §105. At the hearing on Boyer's Motion on May 5, 1989, Karim appeared and argued that Wear's debts had been discharged by the court's order of August 17, 1988, and that the court now lacked jurisdiction to

enter any additional orders in the case. The trial court vacated the discharge and imposed sanctions of $2,000.00 against Wear and his attorney, Andrew E. Karim, jointly and severely. It is that order which Karim seeks to have this Court review.

I. THE SANCTION ORDER ENTERED AGAINST KARIM DID NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Petitioner claims he was denied his due process rights because he was not given adequate opportunity to respond before the bankruptcy court levied sanctions against him. Petitioner was first advised on September 20, 1988, that the trial judge intended to impose sanctions against the Debtor and Petitioner for improperly continuing an acrimonious divorce proceeding in the bankruptcy court. Petitioner was again warned on December 1, 1988, that sanctions were forthcoming. The sanctions were finally ordered by the trial judge at a hearing held May 5, 1989. Petitioner received eight (8) months notice that the bankruptcy trial judge intended to levy sanctions against him. However, Petitioner did nothing.

The liberal due process requirements set forth by the Tenth Circuit Court of Appeals in White v. General Motors Corp., 908 F.2d 675 (10 Cir. 1990), require that actual notice of intent to levy sanctions be given to an individual before sanctions can be ordered. Karim twice received the actual notice of the contemplated sanctions; not just the presumed notice that the existence of Fed. R. Civ. P. Rule 11 and Bankruptcy Rule-9011 is deemed, by some courts, to impart. See, authorities cited in Petitioner's Question 1.

Karim argues that the differences among the circuit courts about what constitutes the proper notice, either actual or imputed, to be afforded a litigant when sanctions are being considered needs to be resolved by this Court in this appeal. Assuming the differences cited by Karim are so extreme as to require reconciliation by this Court, Respondent submits this is not a proper case on which to base such a reconciliation. Karim was sanctioned after actual notice by the Court, which afforded him the full measure of due process protection he was entitled to receive under any of the cited precedents, leaving this court unable to grant Karim any relief.

II. THE BANKRUPTCY COURT HAD CONTINUING JURISDICTION TO IMPOSE SANCTIONS AFTER DISMISSING THE UNDERLING ACTION.

Petitioner contends that the trial court lost jurisdiction to impose sanctions the moment the case was dismissed. This assertion is incorrect. It is settled law that a federal court may consider and adjudicate collateral issues, including sanctions, even though a case has been dismissed. Cooter & Gell v. Hartmann Corporation, et al., _____ U.S. _____; 110 S.Ct. 247 (1990). The trial court had jurisdiction to enter the sanction order appealed from and affirmed by the circuit court. Petitioner has not articulated any reason why this precedent should be reviewed and modified; therefore, this court should decline to do so.

III. MONETARY SANCTION IS AN APPROPRIATE REMEDY WHERE THE TRIAL COURT FINDS THERE IS A MISUSE OR ABUSE OF THE JUDICIAL SYSTEM.

The trial judge had sat in the Wear bankruptcy for almost two (2) years at the time the sanction order was issued. The trial

judge presided over three (3) adversary complaints, eight (8) appeals to the United States District Court for the Western District of Oklahoma, six (6) appeals to the Tenth Circuit Court of Appeals, including an original action seeking discretionary Writs of Mandamus and Prohibition filed in the Circuit Court. Each time the result was the same; the relief sought by Petitioner or his client was denied. It is against this backdrop that the bankruptcy trial judge imposed sanctions against Wear and Karim for misuse and abuse of the bankruptcy system.

The trial judge's ruling was authorized by 11 U.S.C. §§305 and 307 and clearly supported by the facts. The trial judge's ruling was also consonant with existing legal precedent permitting a trial court to impose sanctions as a means of controlling litigation and litigants. Nasco, Inc., v. Calcasieu Television and Radio, Inc., et al., 894 F.2d 696, 703 (5th Cir. 1990), cert. granted. The trial judge did not abuse his discretion in this case; therefore, there is no error for this court to correct.

IV. THE MONETARY SANCTION AGAINST PETITIONER DOES NOT CONSTITUTE EXCESSIVE BAIL OR CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT.

Petitioner suggests that he might have been subjected to a criminal proceeding and that his rights, under the Eighth Amendment, might have been violated. However, Petitioner was not accused or found guilty of engaging in any criminal act. Petitioner was not subjected to punishment for criminal contempt.

"[W]hen a Court is faced with bad conduct frustrating its ability to discharge its judicial duty, it is not confined to the process of criminal contempt, but may impose other sanctions in order to control the litigation before it." Nasco, Inc., v. Calcasieu Television and Radio, Inc., et al., 894 F.2d 696, 703 (5th Cir. 1990) cert. granted. Imposition of sanctions by the bankruptcy court did not violate any of the protections found in the Eighth Amendment to the United States Constitution because the process did not involve any allegations of criminal conduct. Petitioner's request that the Court consider whether or not a fine can constitute a criminal sanction is not reasonably encompassed within the factual issues and should not be addressed by the Court.

V. A BANKRUPTCY JUDGE HAS CONTINUING JURISDICTION TO REVOKE A DISCHARGE IMPROVIDENTLY OR ERRONEOUSLY ENTERED IN A BANKRUPTCY CASE.

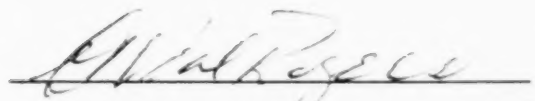
A bankruptcy court has continuing jurisdiction and thus the power to vacate a discharge that has been entered as a result of a clerical error. The trial judge determined that such an error had been made, and corrected it.

The memorandum opinion of the Tenth Circuit Court of Appeals addressed this issue most succinctly when it held, "This argument is without merit. We agree with the bankruptcy court's characterization of the entry of the dismissal order as a clerical error. The Bankruptcy had the power to vacate a discharge entered as a result of a clerical error. See, Matter of Pilar Cordova Antuna, 45 B.R. 271, 272-74, (Bkrtcy. W.D. Mo. 1985)." Nothing improper occurred which requires review by this court.

CONCLUSION

Petitioner does not present any issue which requires review by the court. The Petition should be denied.

LAWRENCE & ELLIS, P.A.

By: 

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